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No. 91-192

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

THERESA A. LaPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods, Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LaPAGE, Individually,

Petitioners,

against

LYNNE Di COSTANZO, M.D., REUVEN LEVY, P.C. and ALICE HYDE MEMORIAL HOSPITAL,

Respondents.

APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT ALICE HYDE MEMORIAL HOSPITAL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counterstatement of Question Presented for Review

1. Does New York State's Wrongful Death Statute violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution?

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OCTOBER TERM, 1993.

THERESA A. LAPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods, Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LAPAGE, Individually,

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Respondents.

APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Brief for Respondent Alice Hyde Memorial Hospital in Opposition to Petition for Writ of Certiorari

The Respondent, Alice Hyde Memorial Hospital, respectfully requests that the Court deny the petition for a writ

of certiorari seeking review of the decision of the Appellate Division, Third Judicial Department, dated June 17, 1993, and the denial of the application to the New York State Court of Appeals for review of the Appellate Division's decision denying review.

Statement of the Case

The Petitioners commenced an action attempting recovery for the birth of a stillborn fetus. This was in direct contravention of the longstanding rule in New York that a stillborn fetus is not a legally protected entity pursuant to the wrongful death statute.

The Trial Court granted the Respondent's motion to dismiss the Petitioner's cause of action on behalf of the stillborn infant but the individual cause of action for injury to the Petitioner mother still remains. The Appellate Division upheld the decision of the Trial Judge and the Court of Appeals denied an application for a review. It is the position of the Respondent, Alice Hyde Memorial Hospital, that the Decision and Order of the Court below should be affirmed, and the longstanding rules and principles regarding this area of the law in the State of New York should be followed.

Reasons for Denying the Writ

I.

The Law of New York State regarding the cause of action on behalf of a stillborn fetus is clearly set forth in New York's Estates Powers and Trusts Law Section 5-4.1 and the cases interpreting it.

That portion of the Estates Powers and Trusts Law which governs this issue is Section 5-4.1 and provides in its pertinent part as follows:

> "The personal representative . . . of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued."

The case of *Endresz v. Friedberg, et al.*, 24 NY2d 478, since 1969 the leading case in this area, has held that before there is a decedent there must be a person born alive. The legislature did not intend to include an unborn fetus within the term decedent.

Most of the issues that are raised by the Petitioners in this matter were addressed in the *Endresz* case.

At pages 8 and 9 of Petitioners' Brief, they argue that the court appointed representatives of the deceased, are denied the right to sue accorded to a person who lives eighteen (18)

minutes longer than she did and stated that the medical professionals were responsible for her delayed birth. They next set forth that Ashley Marie Jenkins was a full-term birth, alive with a detectible heartbeat at 6:25 p.m. on February 9, 1989. At 6:43 p.m. she was stillborn. Again, they state that she had a legal personality from the time of her viability until the time that she was delivered and apparently dead. Using those facts, they argue that she has been deprived of her life without due process or the right to sue accorded others who, when delivered by caesarean section, had signs of life and further, that she was not accorded the rights of other tortiously injured children simply because her birth was delayed. Obviously, they argue that the basis of the suit was occasioned by the carelessness of the medical professionals.

These matters were specifically addressed in the *Endresz* case, starting at page 484.

> "The hardship of many of the decisions denying relief (in prenatal injury cases) lay in the fact that they required an infant to go through life * * * bearing the seal of another's fault. There is no such justification in the wrongful death situation. * * *
>
> A fundamental basis of tort law is the provision for compensation of an innocent plaintiff for the loss he has suffered. Tort law is not, as a general rule, premised upon punishing the wrongdoer. It is not submitted that the tortious destroyer of a child *in utero* should be able to escape completely by killing instead of merely maiming. But it is submitted that to compensate the parents any further than they are entitled by well-settled principles of law and to give

them a windfall through the estate of the fetus is blatant punishment."

Further, beginning on page 485, the *Endresz* case continues:

"It is urged that, since a child *en ventre sa mere* is considered in being or alive for purposes of taking property and, in addition, is to some extent protected by the criminal and public health laws, it should likewise be so regarded and treated when injured *in utero* and, indeed, deemed a "decedent" under Section 5-4.1 of the EPTL even when stillborn. However, as the court observed in *Matter of Roberts* (158 Misc. 698, 699), the property and other laws referred to were made "solely for the protection of the child and not for the benefit of those who take through the child." In point of fact, although an unborn child has certain rights under property law, his enjoyment of those rights is contingent upon his being born alive. As the court wrote in *Matter of Peabody* (5 NY 2d 541, 547, *supra*) -where, relying upon *Logan* (3 NY 2d 800, *supra*), we held that a child *en ventre sa mere* is not a person "beneficially interested" in an irrevocable trust within the meaning of Section 23 of the Personal Property Law and hence his consent was not required for its revocation—it is only if "the child [is] later born and able to take possession of the gift or inheritance" that such a child is "considered born and living" (p. 546). In other words, even if, as science and theology teach, the child begins a separate "life" from the moment of conception, it is clear that, "except in so far as is necessary to protect the child's own rights" *(Matter of Roberts,* 158 Misc. 698, 699, *supra*), the law has never considered the

> unborn fetus as having a separate "juridical existence" (*Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 22) or a legal personality or identity "unless it sees the light of day." (*Matter of Peabody*, 5 NY 2d 541, 547, *supra*.) Indeed, one court has noted that, although a child *en ventre sa mere* may inherit, a stillborn child may not pass his estate to heirs or next of kin and there is no way that next of kin may assert a right to share in the child's inchoate estate. (See, e.g., *Hegan v. McDaniel*, 204 Tenn. 235.) Translated into tort law, this means that there is but a "conditional prospective liability * * * created when an unborn child * * * is injured" through the wrongful act of the defendant, and such liability attaches only upon fulfillment of the condition that the child be born alive. (*Keyes v. Construction Serv.*, 340 Mass. 633, 636.)"

The *Endresz* case has stood for twenty-five years as the law of the State of New York. During that period of time, the legislature has chosen not to revise that section of the Estates Powers and Trusts Law. Therefore, the only interpretation that can be given is that it is the intention of the legislature of the State of New York to uphold the principle that a cause of action for wrongful death does not exist for a stillborn fetus. Specifically, the Petitioners have advised this Court that they are requesting that this Court change the law of the State of New York and substitute viability as the basis for the wrongful death action.

II.

The word "person" as used in the Fourteenth Amendment has not been interpreted to include the unborn.

At page 9 of the Petitioners' brief, they argue that the stillborn infant may not have been a citizen, since she was not yet born but she certainly was a "person" and as a "person" she was entitled to the rights accorded other "persons" by the due process and equal protection clauses of the United States Constitution. They further argue that the State of New York by judicial decision, terminated the constitutional rights of Ashley Marie Jenkins and her estate.

The Petitioners herein have cited the case of *Roe v. Wade* (410 U.S. 113, 35 L Ed 2d 147, 93 S Ct 705). Respondent contends that this is misplaced. The *Roe* case clearly holds that the Constitution does not define the word "person" to include the unborn. At page 179 of that case, this Court has held the following:

> "The Constitution does not define "person" in so many words, Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens", speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art I, Section 2, cl 2, and Section 3, cl 3; in the Apportionment Clause, Art I, Section 2, cl 3; in the Migration and Importation provision, Art I, Section 9, cl 1;

> in the Emolument Clause, Art I, Section 9, cl 8; in the Electors provisions, Art II, Section 1, cl 2, and the superseded cl 3; in the provision outlining qualifications for the office of the President, Art II, Section 1, cl 5; in the Extradition provisions, Art IV, Section 2, cl 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in Sections 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. *None indicates, with any assurance, that it has any possible prenatal application.*
>
> All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, *persuades us that the word "person" as used in the Fourteenth Amendment, does not include the unborn.*"

Therefore, although the Petitioner argues that Ashley Marie Jenkins became a person when she achieved viability, and that the language in some of the opinions in the cited cases, namely *Roe*, stand for the fact that the right terminates with fetal viability and only exists in pre-viability cases, it can be seen from the above language that this is wrong. This Court has spoken on the meaning of the word "person" and held it to have no prenatal application.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: Canton, New York
January 27, 1994

Respectfully Submitted,

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